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## CLERICAL MISTAKE IN INDICTMENT AS GIVING GROUND FOR NEW TRIAL.

Our attention has been called to the comparatively recent Illinois case of People v. Stoyan, 280 Ill. 300, 117 N. E. 464, as being subject to criticism for too severely adhering to the old common law rule that an indictment is not aided by the verdict in criminal cases.

In the Stoyan case the indictment alleged that John Stoyan, on April 27, 1917, in the County of Cook, "did then and there, with a certain instrument commonly called a revolver, * * * unlawfully, willfully and maliciously make an assault in and upon one John Stoyan, with intent then and there to inflict upon the person of said Thomas Korshak a bodily injury, contrary to the statute," etc. The Supreme Court held that the apparently inadvertent substitution of the name of "John Stoyan" for that of "Thomas Korshak" was sufficient to nullify the indictment, so that it could not support the verdict of guilty which the jury had rendered.

While we believe the court's decision is "good law," we believe the result is a travesty on justice. Our contemporary, the New York Law Journal, recently criticised us for using this antithetical expression in a recent criticism, declaring they could not conceive how a decision could be "good law" and yet "offend every instinct of justice." Possibly we should explain that the adjective "good" in this expression is not "qualitative," but refers to the technical accuracy of an application of some legal rule. That the law is not the mere logic or reason is abundantly proven by the many weird and unjust conclusions of the common law which have been corrected by modern statutes. The old common law jurists put too much emphasis on the "reason of the law" without taking into the calculation the uncertain element, known as the human equation. A giddy stenographer, all awhirl with the anticipated pleasures of an approaching evening "date," is not the most uncommon or the least unexpected variation of such equation.

From the standpoint of that formidable combination of "reason and authority" the decision is undoubtedly correct. The indictment, following a strict construction, practically alleges that A assaulted B with intent to inflict bodily injury on C. This would not amount technically to an assault on C as charged in the indictment, and, even if it would, the evidence adduced did not sustain the indictment and a fatal variance resulted.

The Illinois Law Review in criticising the decision, calls attention to the old common law rule announced in Rex v. Morris (1774), 1 Leach C. L. 109, that a word or phrase in an indictment which causes confusion in its meaning, may be rejected as surplusage, if the indictment would be sensible without such words. In that case the indictment alleged "that *Francis* Morris the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have; he, the said *Thomas* Morris, then and there well knowing the said goods and chattels last mentioned to have been feloniously stolen, taken and carried away." It is easy to see that the words "the said Thomas Morris," can be easily omitted and the indictment rendered clear and certain. This rule of eliminating "surplusage" is clearly supported by the authorities. Queen v. Crespin, 11 Q. B. (1848) 913; State v. Bailey, 31 N. H. 521; Mayo v. State, 7 Tex. App. 342; Commonwealth v. Randall, 70 Mass. 36; People v. Montieth, 73 Cal. 7.

It would be difficult to apply the rule of elimination of matter of surplusage to the principal case, since the court would have to strike out not only the phrase "one John

Stoyan," but also the word "said" before the name "Thomas Korshak." And even after such elimination the indictment is ungrammatical and confusing. It would take a few additional words to make clear the meaning of the indictment and this, under the decisions, the court clearly has no right to do. Littel v. State, 133 Ind. 577, 585.

It was held by Justice Story, in United States v. Howard, 3 Sumn. 12, 26 Fed. Cas. 388, that "no allegation, whether it be necessary or unnecessary; whether it be more or less particular, which is descriptive of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." In the Stoyan case the phrase, "one John Stoyan," is not an appositional phrase, but an object of the essential verb in the indictment and therefore a necessary part of the description of the offense. To strike out this phrase is to garble the whole indictment and to remake it.

The way out of this difficulty is either for the court to apply the statutes of jeofails to criminal proceedings or for the legislature by statute to require the courts to disregard defects or imperfections in the indictment which do not affect the substantial rights of the defendant.

Any reasonable man, unaffected by any constraint of adherence to old common law rules of procedure, would without hesitation say that no defendant could be misled by such a mistake as that made in the Stoyan case. The fact is that in such cases the defendant either discovers the error in the indictment *after* the verdict, or, if before, carefully conceals it as a possible basis for a reversal on appeal. It would not be unjust to the defendant to require him to point out defects in the indictment before trial and give the state opportunity to correct the error. And such is the law in some states. State v. McCunniff, 70 Iowa 217; Kennedy v. State, 62 Ind. 136; State v. Craighead, 32 Mo. 561; Phillips v. State, 35 Ark. 384.

## NOTES OF IMPORTANT DECISIONS.

EFFECT OF THE DEFENSE OF RECRIMINATION IN DIVORCE CASES.—In practically every state a divorce *a vinculo* is granted only to innocent and injured parties. Even if the defendant is guilty of all the charges made against him or her, the other spouse is not entitled to a decree if it appears that he or she is also guilty of a marital offense. This distinction, we believe, is not insisted on as clearly as it should be and as it appears to have been in the recent case of Geisselman v. Geisselman, 107 Atl. 185, where the Court of Appeals of Maryland held that even when the defense of recrimination is not set up in the answer, it is nevertheless the duty of the courts to refuse to grant a decree where it appears that the plaintiff is not an innocent party.

In the Geisselman case plaintiff sued his wife for divorce on the ground of adultery and because of her conviction and imprisonment for felony. After the wife's adultery and after she had been imprisoned for complicity in a highway robbery, plaintiff, thinking he "was free from his wife," married again. He was indicted for bigamy, pleaded guilty and was paroled. He then brought the present suit for divorce in which he alleges his own wrongdoing, but pleads a desire to be freed from his former wife that he may marry again "the woman whom he married in good faith and thus make her his legal wife and her child legitimate."

The court held that defendant's misconduct made it impossible to grant him a divorce. The defendant contended, however, that he contracted his second marriage under the mistaken belief that the imprisonment of his wife in the penitentiary released him from his marital obligations. But the court answered that as this was a mistake of law and not of fact, it could not be considered as showing his good intention in the matter. The court said:

"One guilty of recrimination is denied a divorce because it is only allowed an innocent party, and no one has the right to base his or her claim for relief on a ground authorized by the statute when he or she has been guilty of the same thing, or of something which furnishes the spouse ground for divorce. But if it be clearly the result of an honest mistake or fact, the court ought to have some discretion to grant relief in cases where there is no question about the good faith and due diligence of the party. Under such circumstances it is not altogether accurate to say that the party is not innocent of recrimination, as understood in divorce courts. The consequences to people who are unquestionably innocent—the spouse and children—are so serious that we are not willing

simply to draw a line and say in no case can one cross it who married the second time in the lifetime of his first spouse without first obtaining a divorce. But, after saying what we have, we do not feel that we would be authorized to grant relief in this case. In the first place, the mistake made by the appellant was not one of fact, but of law, and the authorities generally hold that a mistake of law cannot excuse one charged with adultery."

The defense of recrimination is an invention of the ecclesiastical courts and adopted by the courts of this country without any statutory authorization. The courts have generally compared the rule to the equitable maxim that one who comes into equity must come with clean hands. Still another analogy suggested by the courts is that the parties are *in pari delicto*. (Mattox v. Mattox, 2 Ohio St. 234, 15 Am. Dec. 547.)

The result in the principal case is to be regretted. It is difficult to believe that the law properly applied should work such an injustice. The wife was an adulterer and a felon. The husband, until her imprisonment, was innocent of any marital offense. Then, thinking he was released, he married. While his failure to know the law could not relieve him from the guilt of bigamy, yet we believe that it should have had some influence with the court in sustaining the defense of recrimination. In several cases the courts have held that the misconduct of the wife *following* the misconduct of the husband and probably the direct result of it will not bar her suit for divorce. Prather v. Prather, 99 Iowa 393; Symons v. Symons (1897), Prob. 167, 77, L. T. 142. The plaintiff's misconduct, while it was due to a mistake of law, was also provoked by defendant's prior misconduct and this, it seems to us, should have been taken into consideration by the court, in considering the effect of the defense of recrimination.

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CAN A WITNESS CORROBORATE HIS OWN TESTIMONY BY PRIOR STATEMENTS OUT OF COURT?—The question stated in the caption was asked us a few months ago. We are glad to be able to call the attention of our inquirer to an opinion by the Supreme Court of Washington, carefully discussing this question. State v. Braniff, 177 Pac. Rep. 801.

This was a prosecution for grand larceny. One of the State's witnesses had been assailed by counsel for defendant as part of a "frame-up." The prosecuting attorney insisted that he had the right to "corroborate" his witness by showing that prior to the trial he had made statements that were consistent with his testimony upon the trial. The Supreme Court properly held that this testimony was objectionable and reversed the judgment of conviction.

The general rule is that evidence of what a witness said out of court cannot be received to corroborate his testimony. Ordinarily it is no confirmation of testimony to show that the witness has made similar statements out of court. To permit such testimony would often intrench the false witness in his perjury by appearing to sanction his testimony under oath by testimony not under oath.

But there is an exception to the rule in cases where the testimony of a witness is impeached on the ground that he has made contradictory statements, or that he has been "coached" and testimony put into his mouth. To contradict such an *attack* on a witness, evidence of prior statements out of court may often be proper. The court in the principal case admits the rule that "when the testimony of a witness is assailed as a recent fabrication, evidence of prior consistent statements is admissible," but has the following to say as to its application:

"In the application of such exception the great majority of the decisions show that the word 'assailed,' when so used, means assailed by at least some form of impeachment of the witness testifying upon the trial. Now, the only manner in which Clark's testimony was assailed by counsel for appellant was, as claimed by counsel for the State, the statement of appellant's counsel in making his opening statement preliminary to the introduction of any evidence, even on behalf of the State, and his cross-examination of Clark before the sheriff testified. It was not claimed that up to this time, or even thereafter during the trial, there was any attempt to prove in appellant's behalf that Clark had at any time previously made statements inconsistent with or contradictory of his testimony given upon the trial, or that there was any attempt on the part of counsel for appellant to introduce impeaching evidence of any nature as such against Clark as a witness. No decision has come to our notice, and we think there is none, holding that the mere assertion of counsel, such as was made by counsel for appellant in his opening statement to the jury, that 'we expect to show you that it is a frameup,' etc., constituted such an assailing of Clark's testimony as to render this testimony of the sheriff as to Clark's previous consistent statements admissible. We also think that the great weight of authority is to the effect that the mere assailing of a witness' testimony by cross-examination, though such cross-examination may suggest impeachment, does not render it permissible to prove previous consistent statements of the witness in order to sustain or corroborate his testimony given upon the trial."

## FIVE TO FOUR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

I shall attempt, here, to show that from the beginning of our Judicial history to the present hour, one man's appointment to the bench, one man's vote, one man's obiter words have not only produced the most momentous events but have often fixed the destiny of our country for all future time. It will not be possible, in the time allowed me, to review, or even to refer to many cases. In a foot-note * I name 45 Five to Four Decisions of the Supreme Court which some of you, at some time in your lives, may wish to examine, and you may, when you have done so, favor the remedy which I shall later suggest. I shall briefly refer to only a few of them, and will not confine myself strictly to the cases, but will allow myself to rove over the field at will, and mention facts and incidents which, in a general way, relate to the point which I desire to press home, with the hope that some day it may result in a change in our legal system which I think will prove of great good to our beloved country.

John Marshall became Chief Justice of the United States on the 31st day of January, 1801, at the age of 42. His first great constitutional decision was made in the year 1803.[1] It was based on this statement of facts: In the December term, 1801, Charles Lee, Attorney General of the United States, moved for a vote to show cause why a mandamus should not issue addressed to Madison, then Secretary of State, commanding him to deliver a commission to Marbury, whom President Adams, before the expiration of his term, had nominated as a Justice of the Peace for the District of Columbia. The nomination had been confirmed by the Senate. A commission had been filled up, signed by President Adams and sealed with the seal of the United States, but had not been delivered to Marbury when Mr. Jefferson came into office. Acting on the idea that the appointment was incomplete and voidable so long as the commission remained undelivered, Jefferson countermanded its issue. The application made to the Supreme Court was for the exercise of its original jurisdiction under the terms of the Judiciary Act and the principal question was whether such a writ could issue from the Supreme Court under the grant of a jurisdiction by Congress in direct violation of the terms of the Constitution in distributing original and appellate authority. The court held that delivery was not essential to the validity of letters patent, and that the right of Marbury to his office was complete, and hence he was entitled to a remedy; but as Congress could not give original jurisdiction to the Supreme Court, in cases not au-

*Virginia coupon cases, 114 U. S. 269; Wheeler v. New Brunswick R. Ry. Co., 115 U. S., 29 U. S. 210; The Great Western, 118 U. S. 520; Hilton v. Gray, 159 U. S. 113; Saltonstall v. Burtwell, 164 U. S. 54; Adams Express Co. v. Ohio, 165 U. S. 194; United States v. Freight Association, 166 U. S. 290; Keck v. U. S., 172 U. S. 434; Atcheson, T., etc., Ry. v. Matthews, 174 U. S. 96; The Pedro, 175 U. S., page 354; 177 U. S. 145; Freeport Water Co. v. Freeport City, 180 U. S. 587; Fairbanks v. U. S., 181 U. S. 283; Downes v. Bidwell, 182 U. S. 244; Wilson v. Nelson, 183 U. S. 191. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403; Lottery case, 188 U. S. 321; Deposit Bank v. Frankfort, 191 U. S. 521; South Dakota v. North Carolina, 192 U. S. 286 Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338; Northern Securities Co. v. U. S., 193 U. S. 197; 195 U. S. 100; San Fran. Nat. Bank v. Dodge, 197 U. S. 70; Keppel v. Tiffin Sav. Bank, 197 U. S. 356. The Eliza Lines, 199 U. S. 119; Haddock v. Haddock, 201 U. S. 562; Fauntleroy v. Lum, 210 U. S. 230; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227; Hyde v. U. S., 225 U. S. 347; Slocum v. N. Y. Life Ins. Co., 228 U. S. 364; Hoke v. U. S., 227 U. S. 308; Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482; City of Owensboro, Wis. v. Telegraph & Tel. Co., 230 U. S. 58; Lankford v. Platte Iron Works, 235 U. S. 361; Cumberland Glass Mfg. Co. v. Dewitt & Co., 237 U. S. 447; L. & N. Ry. Co. v. United States, 242 U. S. 60; Adams v. Tanner, 244 U. S. 590; Paine Lumber Co. v. Neal, 244 U. S. 459; So. Pacific Co. v. Jensen, 244 U. S. 205; Hammer v. Dagenhart, 247 U. S. 253.

(1) Marbury v. Madison, 1 Crench 137.

thorized by the Constitution, his application for a mandamus must be denied.

The importance of this decision lies in the fact that it was the first authoritative announcement by the Supreme Court that it had the right, as well as the power, to declare null and void an act of Congress in violation of the Constitution. It declared that the Constitution was to be regarded as an absolute limit to legislative power, that Congress could not pretend to possess the omnipotence of Parliament.

At once, on his becoming president, Jefferson began a systematic and well organized attack upon the Federal Judiciary. The Federalists, at the close of their days of power, had by an Act of Congress dated the 13th day of February, 1801, sought to entrench themselves, as their critics and political opponents alleged, in the Judiciary department, by rearranging the Judicial Districts, and by the establishment of separate Circuit Courts. Twenty-two districts were established and were divided into six Circuits. This law gave to President Adams the appointment of sixteen new judges and their commissions were secured and delivered upon the eve of his departure from office and the incumbents were derisively styled "The Midnight Judges."

Jefferson did not hesitate to use his power and the new Congress, controlled by him, on March 8, 1802, repealed the Act Establishing Separate Circuit Courts, and in order to prevent Marshall and his associates from interfering, Congress, while destroying the new Circuit Courts, adopted the drastic remedy of suspending for more than a year the sessions of the Supreme Court by abolishing the August term. The Congressional assault was followed up by the impeachment of Judge Pickering, who had become insane because of the non-existence of prohibition laws, and by the impeachment of Mr. Justice Chase. These movements were intended to be the forerunner of a general attack upon all members of the Judiciary, including Marshall, who were in favor of National Consolidation. District Judge Pickering was found guilty, although clearly insane, a fact which robbed his conviction of its significance, while the acquittal of Justice Chase through the extraordinary skill and ability of his counsel in compelling John Randolph and his fellow managers to admit that the phrase "high crimes and misdemeanors" in the Constitution meant indictable offences, firmly established the safety of the Supreme Court, and Federal Judges were made secure in their positions.

Old John Randolph, of Roanoke, in his rage, submitted this amendment to the Constitution:

"The Judges of the Supreme Court and all other courts of the United States shall be removed by the President on the joint address of both Houses of Congress."

Even Jefferson, big and great as he was, could not become reconciled to his defeat. We find him after the lapse of fifteen years writing this to his friend, Thomas Ritchie:

"The Judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone. Having found from experience that impeachment is an impracticable thing, a mere scarecrow, they consider themselves secure for life; they skulk from responsibility, an opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates,

by a crafty Chief Judge, who sophisticates the law to his mind by the turn of his own reasoning."

Thank God for the fact that today the great majority of intelligent, loyal American citizens rejoice that Marshall won in this mighty contest. Under his masterful leadership the supremacy of the National Government was established. As a great American lawyer has said:

As Adams appointed Marshall to perpetuate his Federalistic principles, so, in like manner, Jackson appointed Roger B. Taney, his Attorney General, Chief Justice of the Supreme Court in 1835. Jackson was a fighter. Roger B. Taney was a great lawyer, a great judge, a noble, high-minded Christian gentleman. His term of service was from March 15, 1836, to the date of his death, which occurred October 16, 1864, twenty-eight years. Under his leadership we now realize that much of what was done has proved of imperishable value—"that it was for the best that certain doctrines, particularly those relating to legislative grants, should not be permitted to run to dangerous extremes." As has been truly said:

"In this field Taney wrought better than he knew, and was singularly possessed of that insight, that unconscious sympathy with human progress, which induces a judge, while scrupulously administering existing law, to expand and advance and develop it, commensurate with human needs. The limitations upon the doctrine of the Dartmouth College case, as expressed in the Charles River Bridge case, have produced the happiest results in freeing the States from the grasp of monopolists, and in leaving them uncrippled in the exercise of most important rights of sovereignty. It is true that he adhered to his prior convictions as to the true construction of the Constitution. He was over sixty years of age when he for the first time engaged in judicial work, and they were well known at the time of his appointment. Indeed, as already stated, he was appointed because of them. Men fit to serve in high judicial positions have strong convictions and they carry them with them when they put on the Judicial robe. They must, as a rule, affect the Judicial mind."

In all history there is no individual life which has had more influence on the history of our law than that of Abraham Lincoln. The general facts of his administration are known to almost everyone. But the great value of his service in connection with the Supreme Court is not so well known. Again we see the great power of a president. It is possible that some time in weighing the several candidates for president the question—What kind of men would he be likely to appoint to the Supreme Bench?—will be more carefully considered. Time does not permit to go into details. Just a bare reference can be made to his service. Lincoln, seventeen days after his inauguration, saw the walls of Fort Sumter tremble and fall, and Old Glory, which had waved so proudly o'er its ramparts, lowered and surrendered to armed men bent on the destruction of the nation. He did not say, as his immediate predecessor had said: "I have no power to coerce a sovereign state, let our erring brethren depart in peace," but at once he issued a proclamation ordering the blockade of southern ports and the capture on the high seas of ships carrying contraband goods, or, of ships owned by citizens residing in the rebellious states.

This proclamation raised the vital question: Was there a war? Could there be a prize? The real peril of the situation is best described by Mr. Richard H. Dana, Jr. He said:

"The government is carrying on a war. It is asserting all the powers of war. Let the claimants of the captured vessels not only seek to save their vessels, by denying that they are liable to capture, but deny the right of the government to exercise war powers—deny that this can be, in point of law, a war. So the Judiciary is actually, after a war of 23

months' duration, to decide whether the government has the legal capacity to assert these war powers. Contemplate the possibility of the Supreme Court deciding that this blockade is illegal. What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have been unlawfully subjecting to a cotton famine, and domestic danger and distress for two years. It would end the war, and where it would leave us with neutral powers, it is fearful to contemplate. Yet such an event is legally possible. I do not now think it probable, hardly possible, in fact. But last year I think there was danger of such a result when the blockade was new, and before the three new judges were appointed."

Why does he say "last year I think there was danger of such a result?" The answer is: The then composition of the Supreme Court. Three of its number had been appointed from slave holding states, and Chief Justice Taney had already from his Circuit bench in the Merryman case challenged the legality of that most important act of President Lincoln, the suspension of the Habeas Corpus Act. By death and war, however, vacancies were created, and Lincoln named three stalwart men, great lawyers, great men, sound to the core in the conviction that all means necessary to save the Union could be constitutionally employed —Swayne, Miller and Davis. Justice Miller is the great outstanding figure in the Triumvirate. Of him it has been truly said: "The finding of such a judge by the President was only less fortunate than the finding of such a President by the country." During his years of service he wrote more opinions of the court than any judge, living or dead, and more opinions in construction of the Constitution than any justice who ever sat in the Supreme Court. His work entitles him to stand with Marshall and Story.

Chase had previously been appointed Chief Justice. His appointment by Lincoln is frequently cited as one of the greatest proofs of his undoubted magnanimity.

It seems to be the consensus of opinion that had Justice Chase lived he would now be regarded as great a Chief Justice as he was a Secretary of the Treasury. But it is a fact appearing of record that some measures which he had devised as Secretary of the Treasury for the salvation of the country he later, as Chief Justice, declared unconstitutional and void. While we should honor the candor and self-control which inspired such action, and agree that "men find it easy to review others, but much more difficult to criticise and review their own acts, to admit that they were wrong, we have great reason to rejoice over the fact that a majority of the court decided that he was right when Secretary of the Treasury, and wrong as Chief Justice. But before this decision was reached in what are known as The Legal Tender cases. Bronson v. Rhodes,[2] and Hepburn v. Griswold,[3] the personnel of the court had to be changed. In these cases the majority concurred with Chief Justice Chase. The three above named, Miller, Swayne, and Davis, alone dissented. But by an act of Congress and the resignation of Mr. Justice Grier, President Lincoln had the opportunity of naming two more. This time he took no chances. He named for one vacancy Judge Strong, who, in Shollenberger v. Brinton,[4] had decided that the legal tender features of the Acts of Congress were constitutional, and Mr. Joseph Bradley, whose views were well known to Mr. Lincoln. Having now a majority, Mr. Lincoln, through his Attorney General, made a motion that the legal tender question might be reconsidered and subsequently, in Knox v. Lee, and Parker v. Davis,[4a] it was so reconsidered. As a result, the former

(2) 7 Wall. 229.
(3) 8 Wall. 603.
(4) 52 Pa. St. 9 (1866).
(4a) 12 Wall. 457.

decision in Hepburn v. Griswold, was distinctly overruled and it was held that the Legal Tender Acts were constitutional and valid. The opinion of the court was delivered by Mr. Justice Strong. He justified reversal of former decision on the ground that it was decided by a divided court, and Mr. Justice Bradley, who wrote a concurring opinion, on the further ground that the decision had largely entered into the political discussion of the day and had not been acquiesced in by the country, which I think is an open admission that a thoroughly informed public sentiment, voicing the judgment and conscience of the American voter, is an irresistible force before which prior decrees and precedents must give way; and also that what practical results will follow as a result of a decision is, and should be considered.

One of the most important decisions of the court since the Rebellion was the Slaughter House cases,[5] involving the construction of the 13th, 14th and 15th amendments. It is one of the great 5 to 4 decisions. It so greatly restricted the scope of said amendments that Mr. John S. Wise of the sovereign state of Virginia, said of it:

"I said that we owed more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of Constitutional liberty as that one decision of the Supreme Court in the Slaughter House cases, declaring what of their ancient liberties remained. That decision, worthy to live through all time for its masterly exposition of what the war did and did not accomplish, did more than all the battles of the Union to bring order out of chaos. When war had ceased, when blood was staunched, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this nation, in this case, planted its foot and said: 'This victory is not an annihilation of State Sovereignty, but a just interpretation of Federal Power.'"

But Chief Justice Chase and Justices Field, Bradley and Swayne, all agreed that the construction of the three amendments by their five associates was wrong, that in declaring valid a state law the quality of citizens before the law guaranteed by the 14th amendment had been trampled upon and was opposed to the whole theory of free government. It was intended by these amendments to secure the citizens against wrong and oppression by the state, but by the judgment of the majority this arm of our jurisdiction is stricken down and the will of the nation defeated.

In 1895, after five days given over to argument another celebrated 5 to 4 case was decided. It was entitled Pollock v. Farmers' Loan and Trust Company.[6] The court decided that the Act of Congress of April 27, 1894, commonly known as the Income Tax Law, in certain of its provisions, was unconstitutional and therefore void. It goes without saying that the country was aroused by this decision rendered by a divided court, especially as the court announced that as to certain other of its provisions no opinion would be given as the judges who heard the argument were equally divided—4 to 4. The people remembered that five months after Fort Sumter was fired upon Congress passed an Income Tax law and as amended from time to time it had continued in force until it expired by its own terms in 1871; that by its application millions of dollars had been raised to meet the expenses of the war; that the Supreme Court should, long years after, when its members were so evenly divided, annul this law, caused a great storm of protest throughout the country. Neither the government nor the other side were satisfied. Both asked for a rehearing.

(5) 16 Wall. 36.

(6) 157 U. S. 429 to 654.

The request was granted. It was re-argued and is reported in 158 U. S. at page 601. Mr. Justice Jackson leaves his sick bed in Tennessee so that the case can be heard before all the Justices. When the decision is announced it is found that five had reached the conclusion that the entire law was null and void, one of them, as generally reported throughout the country, changing his opinion as to its legality overnight. No such vigorous protests against the majority of one appear in the reports of the court as are found in the dissenting opinions of Justices White, Harlan, Brown and Jackson. It was then said by many throughout the land that no such power should be vested in one man, and this opinion has grown with each nullification of law by a 5 to 4 decision of the court.

Fortunately a constitutional way had been provided by which the conscience and will of the people on a subject so vitally affecting the fate of their country had been provided and the power of Congress is now made certain by the 16th Amendment.

Lochner v. New York[7] was decided by a 5 to 4 vote. This decision aroused a storm of violent protest. The legislature of the State of New York enacted a labor law which was approved by its governor. Section 110 of said law provided that no employe shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day. Lochner was arrested for allowing an employe to work more than sixty hours in one week. He was convicted. The County Court of Oneida County, the Supreme Court and the Court of Appeals, which gave the case most careful consideration, affirmed the conviction. The case was appealed to the Supreme Court and the judgment set aside on the ground that the law was not a legitimate exercise of the police power of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such in conflict with, and void under, the Constitution. Justices Harlan, Day, White and Holmes dissented. Mr. Justice Harlan said:

"No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the Judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice, or reason, or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizens against merely arbitrary power. That is unquestionably true; but it is equally true, indeed, the public interests imperatively demand, that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

The last 5 to 4 decision to which I shall call attention concerns child labor.

Congress, heeding a strong public sentiment against the employment of children in factories, enacted the Act of September 1, 1916, which prohibited transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of 14 years have been employed or permitted to work, or children between the ages of 14 and 16 years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 p. m., or before the hour of 6 a. m. The people of the country thought that the fight had been won. But once again the courts are appealed to and asked that the law be declared null and void. On June 3, 1918, the case of Hammer, United States Attorney for the

(7) 177 U. S. 145.

Western District of North Carolina v. Dagenhart[8] is decided and declared unconstitutional and void, on the ground that in a two-fold sense the act was repugnant to the Constitution: "It not only transcends the authority delegated to Congress over Commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend." But four of the Justices held just the opposite opinion. The dissenting opinion was prepared by Mr. Justice Holmes. He said:

"The act does not meddle with anything belonging to the states. They may regulate and inter-link affairs and their domestic commerce as they like, but when they seek to send their products across the state lines they are no longer within their rights. If there were no constitution and no Congress, their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy, whatever effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at their boundaries, the state encounters the public policy of the United States, which it is for Congress to express."

By the vote of one man all the work of years was undone. It must be done all over again. Congress at once enacted a law to cover the defects of the former law. It placed a tax of 10 per cent on products of factories employing children under 14 years of age, or those between 14 and 16 years working more than 8 hours daily, when the products enter interstate commerce. Again Judge Boyd is appealed to and again he decides that this second act of Congress is null and void as it seeks to accomplish the regulation of employment by indirection in the use of the taxation powers, and is an invasion of the state's regulatory authority. And now it must go to the Supreme Court again. If again it is declared void by one vote, then the long process of amending the Constitution must begin.

The subject I am presenting is not an academic one, it is a vital, living question, pressing home for solution. The Executive Council of the American Federation of Labor has adopted a report, providing among other things, that the practice of courts in vetoing legislation should be remedied by providing that when a legislature re-enacts the measure the same shall become the law without being subject to annulments by the court.

President Gompers said:

"We mean that the power of government shall be taken out of the hands of our Judiciary, which now exercises a power exercised by no other Judiciary in the world. We mean that, when the people of the United States have educated themselves up to certain reforms in government, when these reforms have been run into legislation, and passed by Congress and approved by the President, they shall not be nullified by the edict of the Judiciary, which sometimes, owing to a decision of the court, is the edict of a single man."

We are face to face with this dangerous propaganda. It means the substitution of the independent power of the Judiciary by the unrestrained will of a legislature or Congress. It means the substitution of one system of government for another. Lawyers know that there can be no real liberty, under our present system, other than through the medium of the Courts of Justice, whose duty it must be to declare all acts contrary to the clear provisions of the Constitution void.

What is the remedy for this public impatience and criticism of the power of the courts to preserve constitutional rights? By simply removing the cause on which it is based. That cause is the easy way in which the deliberate will of the people has been and can be thwarted. They feel that in subjects near to their hearts those

(8) 247 U. S. 277.

words of Chief Justice Marshall in Fletcher v. Peck[9] have been disregarded. He says:

"The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void."

They cannot understand how such a law can be so doubtful, in a constitutional sense, when they know that before it was enacted it was critically examined by the Judiciary Committees of both House and Senate, composed of the ablest lawyers of the Congress; when they know that it was also examined by the Attorney General of the United States; then when four Justices of the court, after full consideration, are also of the opinion that the law is constitutional, they think, and I submit that they have reason to think, that no such doubt exists as to warrant the annulment of the law by a 5 to 4 vote. No man can be convicted without a unanimous vote of 12 men. In all cases of impeachment a two-thirds' vote is required. I submit that this rule should obtain when a law of Congress is impeached.

A great responsibility rests upon the lawyers of this country. If there be security for life, liberty and property, it is because the lawyers of America in the past have not been unmindful of their obligations as ministers of justice. Jefferson, who wrote our Declaration, was a lawyer. Lawyers framed, in large part, our Constitution. Search the history of every state in the union, and it will ever be found that they have always been foremost in all movements having for their object the maintenance of the law against violence and anarchy; the preservation of the just rights both of the government and the people.

FRED A. MAYNARD.

Grand Rapids, Mich.

(9) 6 Cranch 37-128.

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LARCENY—SERIES OF LARCENOUS ACTS.

WEST v. COMMONWEALTH.

Supreme Court of Appeals of Virginia, June 12, 1919.

The taking of property at different times, though from the same place and same owner, constitutes separate offenses, and no aggregation of successive petit larcenies, not constituting parts of a continuous transaction, but each complete and distinct in itself, can be combined in one prosecution, so as to make a case of grand larceny.

KELLY, J. Frances West obtained this writ of error to a judgment sentencing her to a term of three years in the penitentiary for grand larceny.

The indictment charged the larceny by Frances West of various articles of wearing apparel and tableware of the aggregate value of $286. The accused had been employed as cook and house girl in the Robertson home for several months. Shortly after the larceny is supposed to have been committed, she became ill, went to a hospital for treatment, and thereafter did not return to her former position. About that time Mrs. Robertson began to miss dishes and other small articles, and becoming suspicious on that account, she opened what she called her "treasure trunk," which she kept in the kitchen, and in which she had stored the most valuable of the stolen property. The contents of this trunk had disappeared. A search was made, and they were found in the possession of the accused. Her explanation was unsatisfactory in itself, and was contradicted by Mrs. Robertson. The evidence is conflicting as to the actual value of the property stolen, but it was quite sufficient on the part of the commonwealth to establish the value of more than $50, the amount necessary to constitute grand larceny. This is true as to the contents of the "treasure trunk" alone, regardless of what the other articles were worth.

A short time before the accused gave up her position in the house, Mrs. Robertson was away from home on a visit of about three days. She could not tell when the stolen articles were taken, but supposed it was while she was ab-

sent on that visit, because she could not see how the accused could have taken them without her knowledge when she was at home.

Upon evidence as substantially outlined above, the accused asked for an instruction, which the court amended, and its action in refusing to give the same in its original form, and in giving it as amended, is assigned as error. The instruction appears below, the amendment being indicated by italics:

"That grand larceny is the taking of goods of the value of $50 or more; and if the jury believe that the alleged stolen articles were taken at substantially different times, then the burden is upon the commonwealth to prove, beyond a reasonable doubt, that the defendant took goods of the value of $50 or more at one time, or else the accused cannot be convicted of grand larceny, *unless they believe that the accused, in pursuance of a single impulse, stole the articles mentioned in the indictment so as to form a continuous action; then in that case the accused may be found guilty of grand larceny.*

Broadly stated, the general rule is that the taking of property at different times, though from the same place and the same owner, will constitute separate offenses; and no aggregation of successive petit larcenies, not constituting parts of a continuous transaction, but each complete and distinct in itself, can be combined, in one prosecution, so as to make a case of grand larceny. Monounghan v. People, 24 Ill. 340; Cody v. State, 31 Tex. Cr. R. 183, 20 S. W. 398; Scarver v. State, 53 Miss. 407.

But a series of larcenous acts, regardless of the amounts and value of the separate parcels taken, and regardless of the time occupied in the performance, may and will constitute, in contemplation of law, a single larceny, provided the several acts are done pursuant to a single impulse and in execution of a general fraudulent scheme. 2 Whart. Cr. Law (11th Ed.) § 1169; Id. vol. 1, § 34; Woods v. People, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, 523, 524, and note, 113 Am. St. Rep. 415, 6 Ann. Cas. 736; 1 Bouv. L. Dict. (Rawle's 3d Rev.) p. 657.

Viewed in the light of these principles, it is manifest that, in the abstract, both the original instruction and the amendment thereto embody correct legal propositions. This, we believe, is conceded. It is claimed, however, that there was no evidence upon which to base the amendment. We cannot accept this view. The proof plainly tended to show that the articles were stolen, and, particularly as to those contained in the "treasure trunk," that they disappeared during a brief absence from home of the owner; the accused having apparently availed herself of the opportunity thus afforded to commit the crime. This in itself was enough to warrant the inference that she took the contents of the trunk under a single impulse, and that, whether she removed them in parcels or as a whole, she was simply carrying out a general purpose to steal them all. Indeed, except for her own testimony (contradicted by Mrs. Robertson and rejected by the jury), in which she claimed that some of the goods were given, or lent, or sold to her, there was no proof that she did in fact carry them off at substantially different times. Mrs. Robertson's statement, that she missed some things about the house "from time to time," relates, as the context plainly shows, to a period just subsequent to the defendant's term of service in the house. It was because she missed certain things that Mrs. Robertson's suspicion was aroused, and this led to the discovery that all of the articles mentioned in the indictment were gone, and they were all found in the possession of Frances West.

The case is simply one in which the accused is shown to have stolen a quantity of goods, but without anything to show how, or when, or in what quantities, the asportation took place, except that it was most probably done within a certain brief period of the owner's absence.

Under these circumstances, it may well be doubted whether the accused was entitled to any instruction which would have permitted the jury to separate the offense into separate units, so as to reduce the grade and punishment of the crime. If she had admitted the stealing, and had then claimed that she took the various articles at substantially different times, there would have been evidence before the jury upon which to base an instruction on the theory of a series of separate and petit larcenies.

If, however, it be conceded that the accused was entitled to an instruction based on the theory that she stole the articles at substantially different times, and in separate parcels of less value than $50 each, then it was clearly the duty of the court, in view of the evidence as above detailed, to present to the jury the further view that stealing goods in parcels pursuant to a single impulse constitutes the same crime as if they are taken all at once.

Affirmed.

NOTE—*Grand Larceny in Aggregating Values of Several Larcenous Acts.*—The principle declared in the instant case has had some curious manifestations or applications. Thus in Woods

v. People, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, it was held that one who conveys gas around his meter so that it will not be measured as it is used and thereby takes gas each day, each day's use is not a separate offense, but the offense is a continuous one. This case involved an arrangement whereby the servants of a dancing master really used the gas by his direction, that is, they turned it on and kept it burning by his direction. The court said all of the gas that was used during the period of its being carried around the meter could be aggregated so as to determine whether there was grand or petit larceny.

In Weaver v. Com., 27 Ky. L. Rep. 743, 86 S. W. 551, it was held that if a thief took at one time a smaller quantity of goods of less than the sum constituting grand larceny, and afterwards he came to the conclusion to take other goods, *the two* takings could not be added together so as to constitute the offense of grand larceny. The court said: "If the articles were taken as the result of a single purpose or impulse, though the asportation was at intervals to better suit his convenience, the degree of the offense will not be lessened by the fact that he could not or did not carry away all the articles at one load. But if appellant took at one time certain articles of less aggregate value than $20 and *later* determined to and did take others, also of less value than $20, nevertheless the two larcenies cannot be added together. * * * Petty stealing by being often repeated is not raised to the crime of a felony. The nature of the transaction must determine whether the offense was one or a series of offenses."

Not wholly different from the theory of separate takings in furtherance of one impulse or intent constituting a single offense is the case of a taking from different receptacles at one time of property of different persons constituting one offense. State v. Sampson, 157 Iowa 257, 138 N. W. 473, 42 L. R. A. (N. S.) 967. It has been held in a number of states that the stealing of several articles at one time and place is a continuous act or transaction. Clemm v. State, 154 Ala. 12, 45 So. 212, 129 Am. St. Rep. 17; State v. Warren, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; Dalton v. State, 91 Miss. 162, 44 So. 802, 124 Am. St. Rep. 637.

Thus, it was said in Com. v. Ault, 10 Pa. Super. Ct. 651, that: "One offense may be committed to the injury of two or more persons and where several chattels, the property of different owners, are stolen or feloniously received, at the same time and place, the whole may be considered as one taking and embraced in one count of the indictment." See also Nichols v. Com., 78 Ky. 180.

Certainly there is or may be, as believed by the jury, one intent in the two kinds of thefts and this is the true test according to the spirit of American jurisprudence, departing more and more from technical considerations. C.

## CORRESPONDENCE.

### SOLICITING A DAMAGE SUIT BEFORE THE CORPSE HAS BEEN DECENTLY BURIED.

Our esteemed subscriber, Mr. R. C. Postlethwaite, of Jewell City, Kan., calls our attention to the fact that a lady relative, living in Arkansas, who recently lost her husband by death in a railroad accident, was solicited by an attorney in another county in Arkansas within twenty-four hours after the accident. Mr. Postlethwaite sent us the original letter, signed by a lawyer of a leading town in Northwest Arkansas. This attorney, it appears, is rated very highly in Martindale's Legal Directory and, according to his own admission, has enjoyed a successful practice for over twenty years. There is, therefore, not the mitigating circumstance of poverty and necessity to be advanced in his favor, which often impels a younger attorney to resort to unethical practices to get business. The following is the letter in full, omitting all names:

Dear Madam:

I have just read in to-day's Little Rock Gazette of the sad death of your husband, who was killed while operating an engine for the Kansas City Southern Railroad Co. There is bound to be a legal liability against the Railroad Co. in the matter. I have made a specialty of death cases and personal injury cases against railroads and coal mines for, now, 20 years. I practice all over the Southwest and have obtained judgments against Railroads in Greenwood and Fort Smith and in Oklahoma and Texas. As to my standing as a lawyer and citizen I give you as reference the Circuit Judge of this District or any of our county officials.

My terms of employment is the same with every one. I take your case on a contingent fee for one-half or 50% of what we get out of the company, and neither is to settle without the knowledge and consent of the other. And if my clients haven't the money to pay for the advance cost to file and start her suit I will advance it for them. I would like to handle your case for you, and would take special interest in it for you. And nothing would be a greater pleasure to me than to obtain a handsome sum of money for you out of the Railroad Co. for the death of your good husband. I will come to see you if you desire to employ me.

Yours very truly,

X. Y. Z.

We have suggested that Mr. Postlethwaite send the original letter to the Grievance Committee of the Arkansas Bar Association, who

will, without doubt, understand that the practice of the law is not a storekeeper's trade, but a profession of high ideals and standards of propriety.

The direct solicitation of legal business, especially the stirring up of litigation, is reprehensible and clearly forbidden by the Code. (Canons of Professional Ethics, Sec. 27.) But when this solicitation is by a stranger, and before the mangled body of the husband is decently buried, the conduct becomes such as to merit the condemnation of every decent citizen, irrespective of his trade or profession.

—EDITOR.

## LICENSE TAX DISTINGUISHED FROM A TAX ON INTERSTATE COMMERCE.

*Editor, Central Law Journal:*

In your editorial of August 15 you discuss the case of American Manufacturing Company v. City of St. Louis, where the court held that a license tax calculated on the amount of sales is simply the condition of a license to do business, the fact that the amount of the tax is based on the amount of annual sales simply affording a just and equitable method of assessing the tax. The amount of the tax, accordingly, varies with the amount of goods sold. You are quite right in pointing out the uncertainty which must certainly result in practice as a result of two decisions where the difference in principle is so small as to be invisible, even to many investigators.

In this connection the case of Thierman v. Cmw, (1906) 123 Ky. 740, 97 S. W. 366, is of interest. A Senate act provided a license tax on spirits; 50 cents a barrel on rectified spirits. Such a tax was said not to be a tax on manufacture, but on sales as shown by the report of the rectifier. This report was required to show the amount of tax that would have to be paid. The court declared that the tax did not come under the police power, since its primary object was the raising of revenue—otherwise, why base it on the amount of sales, as shown by the required report? In some respects this would seem analogous to the Crew Levick case, in both taxes based upon the amount of sales being declared unconstitutional.

NOEL SARGENT.

St. Paul, Minn.

## HUMOR OF THE LAW.

Former Railroad Chief McAdoo has finally admitted that not everybody was satisfied with the Federal Administration of Railroads. He says:

"I was on my way back to my summer home in Santa Barbara when I chanced to overhear this conversation as we stopped at one of the way stations:

"'Going to get out here and stretch your legs?'"

"'No! They pulled them both when I bought my ticket in Los Angeles,' was the reply."—*St. Louis Republic.*

An advertising solicitor from Boston was inordinately proud of the fact that one of his ancestors affixed his name to the Declaration of Independence. He had occasion to call upon Sol Wexler, then president of the Whitney Central Banks of New Orleans. Sol was signing a number of checks and affixed his signature with many a curve and flourish. The salesman's patience becoming exhausted in waiting for recognition, he finally observed:

"You have a fine signature, Mr. Wexler. My grandfather was something of a signer. He signed the Declaration of Independence."

"So?" said Wexler, with rising inflection, and then he added: "Vell, you ain't got notting on me. One of my forefathers signed the Ten Commandments."—The Lawyer and Banker.

A member of a prison commission, visiting in a penitentiary for purposes of studying the conditions of prison life, chanced to be in the office as one young fellow was being discharged. "Why," said the sociologist to him, "don't you live quietly at home with your family, instead of committing crime that sends you right back to prison just as soon as you get out?"

"Well," said the young fellow with a grim smile, "that's just the point—it's my love of family that gets me into jail."

"How so?"

"Why, my father and mother are both in prison. But we can never meet. They go in, I come out! They leave, I go in. It's a regular thing, and it upsets our family life."—*Cartoons Magazine.*

## WEEKLY DIGEST.

**Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.*



1. **Attorney and Client**—Confidential Relation.—The relationship of attorney and client is one of special confidence, and an attorney has no right to commingle funds of his client with his own private property, or to profit by the use of funds belonging to client.—In re Lunke, Mont., 182 Pac. 126.

2.——Counsel Fees.—The court of chancery has no power to allow counsel fees, in a cause instituted for professional services rendered in a foreign jurisdiction in an independent litigation, but any allowance must be for services rendered in a cause over which court making allowance has jurisdiction.—Hitchcock v. American Pipe & Construction Co., N. J., **107 Atl. 267.**

3.——Settlement by Parties.—Parties to an action have a right to settle it in any manner they see fit without the knowledge or consent of their attorneys.—Wildung v. Security Mortgage Co. of America, Minn., 173 N. W. 429.

4. **Bankruptcy** — Preference. — Under Bankruptcy Act, §§ 60a, 60b, if a creditor receives what he has reason to believe is more than his proportionate share of the bankrupt's property as it then existed, and it turns out to be as he believes, he has received a preference that is recoverable by the trustee.—Slayton v. Drown, Vt., 107 Atl. 307.

5. **Banks and Banking**—Imputable Knowledge.—Knowledge obtained by an officer of a bank as an individual, and not as an officer of the bank, cannot be imputed to the bank, or permitted to operate to its prejudice.—Coleman v. Shortsville Wheel Co., U. S. D. C., 257 Fed. 591.

6.——Imputable Knowledge.—Where one is vice-president and general manager of a bank, his knowledge of terms of agreement entered into on behalf of bank by him with makers of note discounted by bank would ordinarily be chargeable to bank.—Goldstein v. Union Nat. Bank, Tex., 213 S. W. 584.

7. **Bills and Notes**—Accelerating Maturity.—No transaction between the acceptor and holder of a negotiable instrument can advance its maturity as against a subsequent holder in due course, even though it was negotiated after such transaction.—Citizens' Nat. Bank of Glenwood Springs v. First Nat. Bank of Portland, Ore., Col., 182 Pac. 12.

8.——Innocent Purchaser.—That consideration for note was sale of stock in corporation which subsequently became insolvent would not be a defense, especially where the note was in the hands of an innocent purchaser for value.—Braley v. Samuels, Tex., 213 S. W. 684.

9.——Suspicion.—Mere suspicion that a note is without consideration, or has been obtained by fraud, though brought home to the transferee before he acquired the note, is not sufficient to defeat recovery.—Lindsay v. Thomas, Mo., 213 S. W. 513.

10. **Brokers**—Agency.—Where brokers who were authorized in writing to sell land entered into contracts materially departing from their authorization, the fact that the owner, when the purchasers were produced, agreed to sell to them on the terms of their offers, does not entitle the brokers to compensation; the agreement being without consideration as to the brokers.—Sullivan v. Turner, Miss., 82 So. 325.

11.——Exclusive Agency.—A landowner by employing an agent to make a sale of his land does not thereby preclude himself from hiring other agents to sell it, or from making a sale himself if he acts in good faith.—Dickinson v. Robinson, La., 82 So. 398.

12. **Carriers of Goods**—Tariffs.—Under the federal law, a shipper is bound to take notice of the filed tariff rates, and, so long as they remain operative, they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., Mo., 213 S. W. 531.

13. **Carriers of Passengers** — Unalterable Rates.—A municipality has no power to agree upon unalterable rates or charges by public service corporations unless the power to make such a contract was expressly granted by legislative act or is indispensable to the exercise of powers which have been expressly granted.—Ottumwa Ry. & Light Co. v. City of Ottumwa, Iowa, 173 N. W. 270.

14. **Compromise and Settlement**—Discharge of Debt.—Mere acceptance of a lesser amount than actually due does not discharge debt, where not paid as result of compromise.—Klene v. Campbell, Mo., 213 S. W. 520.

15. **Contracts**—Consideration.—A written instrument reciting a consideration imports one. —Miers & Rose v. Trevino, Tex., 213 S. W. 715.

16.——Employment. — A contract between plaintiff as employer and defendant as employe in the business of dealing in meats, etc., providing that defendant within one year after termination of employment should not enter a similar line of business or employ of one engaged in a similar business within city of Philadelphia, being limited both as to time and territory, was such a partial restraint of trade as would be enforced by a court of equity.—Srolowitz v. Roseman, Pa., 107 Atl. 322.

17.——Extra Work.—Provision of building contract that, if extras became necessary to complete the work, they should be provided for by written agreement, was not of the essence of contract, but a detail in its performance, and the requirement of a writing might be waived. —Walberg v. Jacobson, Minn., 173 N. W. 409.

18.——Intoxication.—Where a party to an instrument is deprived of his memory or judgment or rendered incapable of comprehending the nature and effect of the act as a result of intoxication, equity will grant relief against the instrument if the other party thereby obtained an unconscionable bargain.—Harlow v. Kingston, Wis., 173 N. W. 308.

19. **Contribution**—Pari Delicto.—As between actual joint tort-feasors, parties in pari delicto, the law will not enforce contribution or indemnity and in determining whether contribution can be enforced, the test is whether the negligence of the tort-feasors was active or passive. —Village of Portland v. Citizens' Telephone Co., Mich., 173 N. W. 382.

20. **Corporations**—Creditors' Suit.—Where a corporation pending a criminal prosecution against it by the United States, resulting in a judgment imposing a fine, sold all of its property, and distributed the proceeds among its stockholders, such stockholders may be held liable in a creditors' suit for the judgment against the corporation to the extent of their distributive share of its funds, and this although the purchaser assumed all of its debts and liabilities.—Pierce v. United States, U. S. C. C. A., 257 Fed. 514.

21.——Dealing with Director.—An insolvent corporation, in need of funds and ready cash, may borrow the amount needed from a director or other officer of the corporation, and secure it by lien on its property or transfer of its assets.—In re Lake Chelan Land Co., U. S. C. C. A., 257 Fed. 497.

22.——Liability of Officers.—Code, § 1622, making directors and officers of a corporation individually liable to creditors for any indebtedness exceeding the amount permitted by law, knowingly consented to by them, imposes a liability like that of a surety, and is not penal, but contractual.—Parsons v. Rinard Grain Co., Iowa, 173 N. W. 276.

23.——"Private Corporation."—A "private corporation" is one formed for the benefit of its stockholders exclusively.—Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist., Fla., 82 So. 346.

24.——Ratification.—Where a contract in the name and behalf of a corporation is made by one lacking authority, or by one of its general officers whose personal interests in the transaction are adverse to those of his corporation, the corporation, after having received, through another source, full knowledge of all the terms and provisions of the agreement, may ratify, adopt, and confirm it, in which event it will be bound thereby in all respects.—Goldstein v. Union Nat. Bank, Tex., 213 S. W. 584.

25.——Secrecy by Officer.—A director of a corporation has a right to make a fair contract for compensation and for work on behalf of his associates, but such compensation must be reasonable and consistent with his duty to all alike, and there can be no secrecy.—Proctor v. Farrar, Mo., 213 S. W. 469.

26.——Subscription. — That defendants were transferees and not original subscribers to stock of company now insolvent does not of itself relieve defendants from liability for unpaid portion of face value of stock.—Sweet v. Barnard, Col., 182 Pac. 22.

27.——Transferee of Stock.—It cannot be presumed that the transferee of stock in a corporation has knowledge of its by-laws.—Baer v. Waseca Milling Co., Minn., 173 N. W. 401.

28. **Criminal Law**—Drunkenness. — Drunkenness, under Rev. St. 1908, § 1617, is not an excuse for crime, unless occasioned by the fraud, contrivance, or force of some other person, to cause perpetration of the offense.—Seiwald v. People, Col., 182 Pac. 20.

29.——Extraterritorial Force.—The statutes of a state have no extraterritorial force, and its courts have no jurisdiction of offenses committed in other states or foreign countries.— State v. Stephens, Me., 107 Atl. 296.

30.——Intent.—Where the doing of a wrongful act is conceded or otherwise proved, and the innocent intent is in issue, the doing of the same, or a closely similar act so nearly related in time, place, and circumstance that the mental state involved is practically continuous, is admissible on the question of intent.—State v. Unger, N. J., 107 Atl. 270.

31.——Statement by Accused.—A defendant in a criminal case may make to the jury a statement in his own behalf not under oath, which may be received in whole or in part by the jury in preference to the sworn testimony.— King v. State, Ga., 99 S. E. 784.

32. **Death**—Expectancy.—Recovery for present value of life expectancy of a soldier must be based on the evidence, and speculation cannot be indulged in as to what trade or profession he would have engaged in when discharged, or as to what he would have earned by any future employment.—Gulf & S. I. R. Co. v. Boone, Miss., 82 So. 335.

33.——Speculation as to Injury.—Recovery for negligence causing death cannot be had on mere surmises or speculation as to how the injury happened, nor will it be presumed that the defendant was guilty of actionable negligence if the injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability.—Hearell v. Illinois Cent. R. Co., Ky., 213 S. W. 561.

34. **Divorce**—Condonation.—Condonation is a privilege of the injured party, and not of the injuring party.—McLaughlin v. McLaughlin, N. J., 107 Atl. 260.

35.——Custody of Children.—That part of a divorce decree pertaining to the custody of children will not be subsequently modified, un-

less conditions existing at the time of filing motion to modify have changed since the entering of the decree in such a way as to warrant modification.—Sabourin v. Sabourin, Mo., 213 S. W. 490.

36.——Permanent Alimony.—Under Gen. St. 1906, § 1932 (Comp. Laws 1914, § 1932), permanent alimony cannot be awarded to the former wife in a suit by the husband, where the divorce is granted for the fault of the wife.—Phinney v. Phinney, Fla., 82 So. 357.

37. **Execution**—Shares of Stock.—For purposes of execution the situs of shares of corporate stock is within the state where corporation resides, and they may be lawfully levied on therein though owned by a non-resident, in view of Rev. Laws 1910, §§ 1237, 4815, 4819, 4820.—Harris v. Mid-Continent Life Ins. Co., Okla., 182 Pac. 85.

38. **Fraud**—Measure of Damages.—Purchaser's measure of damages for having been induced by fraud to purchase property is the difference between the value of the property and the price paid.—Riley v. Atmar, Tex., 213 S. W. 682.

39.——Misrepresentation.—The buyer of corporate stock under representations that the company had no outstanding obligations, could not recover as for misrepresentations and fraud on account of the purchase of any shares after knowledge of the existence of a liability of the company.—Williams v. Beltz, Del., 107 Atl. 298.

40. **Fraudulent Conveyances** — Creditor. — A girl ravished by a man married to another was his "creditor," to give her rights to set aside his fraudulent conveyances to his wife.—Barkheimer v. Lockhart, Ark., 213 S. W. 381.

41.——Love and Affection.—A deed of property to grantor's wife for a recited consideration of $5, love, and affection, shortly after the foreclosure of a trust deed executed by grantor to secure a note, leaving a large balance still due, was presumptively fraudulent.—Crane & Co. v. Hall, Tenn., 213 S. W. 414.

42. **Garnishment**—Negotiable Check.—In view of Rev. St. 1908, § 3804, providing that no person shall be liable as garnishee by reason of having accepted any negotiable instrument, when the same is not due, it is no defense to suit against a bank which has accepted or certified a check to enforce its liability as acceptor or certifier that it has been garnished for its indebtedness to the payee of the check; for the check is not due until presented by the payee.—Citizens' Nat. Bank of Glenwood Springs v. First Nat. Bank of Portland, Ore., Col., 182 Pac. 12.

43. **Homicide**—Provocation.—In the absence of provocation occurring after defendant and deceased met and settled their differences, matters occurring prior thereto cannot constitute adequate cause to reduce the killing to manslaughter.—Bell v. State, Tex., 213 S. W. 647.

44.——Remoteness of Threat.—In a murder case the remoteness of a general threat made three or four hours before the homicide was not ground for its exclusion, although, if sufficient time had elapsed between the threat and the homicide, it might have affected its probative force.—State v. Parmenter, Mo., 213 S. W. 439.

45. **Husband and Wife**—Coverture.—The defense arising from coverture is personal, and, when pleaded to an action on contract against a married woman, the plaintiff must reply facts which show that the contract sued on is one on which she is bound.—Aldridge v. Clasmeyer, Ind., 123 N. E. 825.

46.——Gift.—A man may make a valid gift of real or personal property to his wife or to the woman he proposes to marry.—Besterman v. Besterman, Pa., 107 Atl. 323.

47. **Insane Persons**—Contract.—A contract of settlement for personal injuries made by an employer with his servant of unsound mind, who has not been judicially so determined, is voidable only.—Haskell & Barker Car Co. v. Logermann, Ind., 123 N. E. 818.

48.——Normal Mind.—A "normal mind" is one which in strength and capacity ranks reasonably well with the average of the great body of men and women who make up organized human society in general, and are by common consent recognized as sane and competent to perform the ordinary duties and assume the ordinary responsibilities of life.—State v. Haner, Iowa, 173 N. W. 225.

49. **Insurance**—Cancellation of Policy.—An insurance agent instructed by principal to cancel a policy issued by him must do so, and, if he fails to do so, he is liable to his principal for damages sustained by principal, unless he can show some valid reason for his failure to follow direction.—St. Paul Fire & Marine Ins. Co. v. Bigger, Kan., 182 Pac. 184.

50.——Police Power.—The regulation of fire insurance rates is so affected with public interest that it falls within the police power of the state and is purely legislative in character.—State ex rel. Waterworth v. Harty, Mo., 213 S. W. 443.

51. **Landlord and Tenant**—Constructive Eviction.—There cannot be a constructive eviction without a surrender of possession, and the tenant will not be permitted to remain in possession and escape payment of rent by pleading a state of facts which, though conferring a right to abandon, has not been acompanied by the exercise of that right.—Peery v. Fletcher, Ore., 182 Pac. 143.

52.——Estoppel.—In landlord's action for rent, the tenant is generally estopped to set up in defense the landlord's want of title when lease was made, so long as tenant is undisturbed in his possession of demised premises.—Levinson Wrecking Co. v. Gatti-McQuade Co., N. J., 107 Atl. 277.

53.——Loss of Profits.—A storekeeper can recover as damages, caused by his landlord's failure to heat buildings, loss of profits, where the evidence established a loss, though the extent of the loss could not be established with certainty.—McDuffee v. Colwell, Mich., 173 N. W. 355.

54.——Sublessor.—In a "sublease" proper, the sublessor retains some right or interest in the premises leased; while in an "assignment" proper, the assignor parts with all his interest whatever in the property demised.—Weigle v. Rogers, Mo., 213 S. W. 501.

55. **Libel and Slander**—Secondary Publication.—Where person receiving a libelous letter exhibits it to another or remails it, there is a secondary publication.—Sourbier v. Brown, Ind., 123 N. E. 802.

56. **Life Estates**—Emblements.—Where a life tenant has leased land for the term of his life for a money rent payable annually, the doctrine of emblements applies with full force to the undertenant; he having even greater privileges than his lessor, the life tenant whom he represents.—Peery v. Fletcher, Ore., 182 Pac. 143.

57. **Limitation of Actions** — Discovery of Fraud.—The statute of limitations on a cause of action for fraud and misrepresentations in the sale of stock does not begin to run until the fraud has been discovered by the buyer, or, perhaps, should have been discovered.—Williams v. Beltz, Del., 107 Atl. 298.

58.——Laches.—All statutes of limitations are based upon the theory of laches, and no laches can be imputed to one who has no remedy or right of action.—Ward v. Meredith, Iowa, 173 N. W. 246.

59.——Running Account.—Statute of limitations does not commence running against running account, even on several different transactions, until accrual of the last item in the account.—Klene v. Campbell, Mo., 213 S. W. 520.

60. **Master and Servant**—Volunteer.—In responding to the request of a servant for assist-

ance in doing his work, decedent, not an employe of any of the contractors, was not a mere volunteer or licensee.—Sandon v. Kendall, Mass., 123 N. E. 847.

61.——Workmen's Compensation Act.—In a proceeding under the Workmen's Compensation Act for the death of a section hand from contact with poison ivy while cutting weeds on the right of way, where there is some evidence to sustain a finding of the State Industrial Commission that deceased was not engaged in interstate commerce, on the theory that the weeds could stall trains, but that the weeds were cut solely to comply with Railroad Law, § 82, it will not be disturbed.—Plass v. Central New England Ry. Co., N. Y., 123 N. E. 852, 226 N. Y. 449.

62. **Money Received**—Equity.—In an action for money had and received, plaintiff may recover only such money as he is in equity entitled to and as defendant is not entitled to retain.—New York Life Ins. Co. v. Anderson, U. S. D. C., 257 Fed. 576.

63. **Monopolies**—Illegality.—Illegality of a conspiracy to form a combination consists in the intent to establish a monopoly and control prices.—G. W. McNear, Inc., v. American & British Mfg. Co., R. I., 107 Atl. 242.

64. **Municipal Corporations** — Government Duty.—In the extinguishment of fires and in making arrangements therefor, the municipality acts in its governmental capacity and is not liable for damages caused by the negligence of its fire department.—Louisville & Southern Indiana Traction Co. v. Jennings, Ind., 123 N. E. 835.

65.——Law of Road—The "law of the road" in the United States, based upon a well recognized custom and usage, requires that a driver shall turn to the right when meeting another upon the public highway.—Mattern v. Jenevein, La., 82 So. 360.

66. **Negligence** — Proximate Cause. — The "proximate cause" of an injury is that cause which is natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred, and which is the efficient cause, the one that necessarily sets the other cause in operation.—Baillargeon v. Myers, Cal., 182 Pac. 37.

67. **Novation**—Change in Method.—In suit on notes, a plea setting up a subsequent agreement, whereby defendant was to work for plaintiff and part of his salary was to be retained to apply on payment, and a discharge after a year in breach of contract, and that new contract superseded notes, showing on its face that original debt was not extinguished, but only a change in method and time of payment, did not set up a novation.—Brantley v. Watt Bros. Co., Ga., 99 S. E. 780.

68. **Perjury**—Materiality.—In a prosecution for throwing rocks at a moving street car, if defendant and his associates had a common understanding or agreement that they would go out to throw rocks at the car, such was a material circumstance the state had a right to show; and if defendant swore falsely he was guilty of perjury, since it is not necessary that the alleged false testimony be sufficient within itself to make out a case, or prevent the making of a case, but only that it be upon "any material matter."—State v. Jennings, Mo., 213 S. W. 421.

69. **Principal and Agent**—Liability of Agent. —An agent who makes fraudulent representations as to merchandise sold is liable personally for his own fraud, regardless of whether he acts for a principal or for himself.—Richardson v. Wilson, Tex., 213 S. W. 613.

70.——Ratification.—A contract made by an insurance agent in its own name undertaking to procure certain things from its principal was incapable of ratification, as a contract to be ratified must purport to be made on account of the alleged principal.—Etwards v. Heralds of Liberty, Pa., 107 Atl. 324.

71. **Railroads**—Last Clear Chance.—The last clear chance doctrine applies to render an interurban railway's motorman liable for injuries at a crossing to plaintiff, whose peril he appreciated, though plaintiff's contributory negligence continued up to the moment of her injury. —Terre Haute, I. & E. Traction Co. v. Stevenson, Ind., 123 N. E. 785.

72.——Private Way.—Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.—Hodges v. Erie R. Co., U. S. C. C. A., 257 Fed. 494.

73.——Punitive Damages.—A railroad company was not liable for punitive damages for having interfered with a landowner's use of a highway, and having made ingress and egress to and from her premises more difficult by its maintenance of an embankment in the highway, a nuisance.—Dickinson v. Delaware, L. & W. R. Co., N. J., 107 Atl. 284.

74.——Trespasser.—Ordinarily a railroad owes trespasser no duty until his peril is discovered, and is not liable for injury to him, unless injury might have been avoided by proper care after discovery of peril.—Gates v. Chesapeake & O. Ry. Co., Ky., 213 S. W. 564.

75. **Sales**—Executory Contract.—An essential to an executed contract of sale is that the materials sold be identified, and a contract of sale is executory as long as anything remains to be done to identify the property which is the object of the contract.—Latta v. Menching, Iowa, 173 N. W. 229.

76.——Executory Contract.—In an executory contract of sale the goods remain the property of the seller until the contract has been executed.—Aldridge v. Clasmeyer, Ind., 123 N. E. 825.

77.——Prompt Rescission.—A party seeking to rescind a purchase of a mare must act with promptness and within reasonable time after discovering her unsoundness, what is a reasonable time being a question of fact to be determined by the jury under the circumstances.—McDonald v. Stafford, Tex., 213 S. W. 732.

78.——Rescission.—Where plaintiff on discovery of the fraud refused to pay monthly installments for truck he had been induced to purchase by false representations of defendant seller and returned truck in compliance with defendant's demand, there was a rescission by consent. Civ. Code, §§ 1689, 1691.—Hogan v. Anthony, Cal., 182 Pac. 52.

79.——Rescission.—In action on purchase-price notes, where buyer had given one of the machines a 2½ months' trial before buying, and had retained machines 8 months after buying, promptly paying 8 of such notes, and where there was no evidence, during the trial, of failure of consideration, court propertly held that buyers could not rescind sale upon ground of worthlessness of machines and failure of consideration.—Humana Co. v. Hughes, Mo., 213 S. W. 515.

80.——Sale F. O. B.—Where goods are sold f. o. b. certain station, seller's delivery to carrier at such station constitutes delivery to buyer, and buyer is liable for full purchase price, regardless of damage to goods in transit.—Standard Boiler & Plate Iron Co. v. Brock, S. C., 99 S. E. 769.

81.——Waiver of Breach.—Renewing note for purchase price of traction engine after knowledge of engine's defects tends to establish waiver of breach of warranty and such waiver becomes conclusive where renewal note expressly waived all claims arising out of purchase.—International Harvester Co. of America v. Burch, Mo., 213 S. W. 493.

82. **Vendor and Purchaser**—Bond for Title.— Where vendor executes bond for title, the effect of the contract is to create a mortgage upon the land in vendor's favor to secure purchase money, subject to all the incidents of the mortgage as effectually as if conveyed by deed absolute with mortgage back to secure purchase price.—Manwaring v. Farmers' Bank of Commerce, Ark., 213 S. W. 407.

83.——Rescission.—In the case of fraud, purchaser may either stand upon the bargain and recover damages, or rescind contract, return the thing bought, and get back what he has paid.—Riley v. Atmar, Tex., 213 S. W. 682.

84. **Warehousemen**—Warehouse Certificates. —The indorsement of warehouse certificates for grain to a bank as security transfers to the bank the legal title to the grain represented thereby.—Central State Bank v. McFarlin, U. S. C. C. A., 257 Fed. 535.

85. **Wills**—Intention.—A will, being operative from the death of its maker, is presumed to refer to a situation then existing, but this presumption yields when the will manifests testator's different intention.—Johnson v. Palmer, Me., 107 Atl. 291.